LION PACIFIC SDN BHD v. PESTECH TECHNOLOGY SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
AB KARIM AB JALIL JCA
GUNALAN MUNIANDY JCA
AHMAD ZAIDI IBRAHIM JCA
[CIVIL APPEAL NOS: B-02(C)(A)-1554-10-2020
& B-02(C)(A)-1558-10-2020]
6 SEPTEMBER 2022

Abstract – *The adjudicator, in completely disregarding the express contractual term that payment for works shall only become due to the claimant upon certification of approval by the project director, and by incorporating a new contractual term into the subcontract to which the parties had not mutually agreed, had shown a lack of sufficient judicial appreciation of the matters and facts before him and had acted in excess of jurisdiction. A payment dispute must be determined strictly within the confines of the subcontract wherein its terms and conditions did not call for the adjudicator to make a determination on a purported clause which is non-existent.*

CONSTRUCTION LAW: *Adjudication – Adjudication decision – Appeal against – Payment claims referred to adjudicator – Whether adjudicator had jurisdiction over adjudication proceedings – Whether Construction Industry Payment and Adjudication Act 2012 applied to subcontract – Whether adjudicator acted in excess of jurisdiction by incorporating new contractual term into subcontract – Whether there were errors in adjudication decision*

There were two appeals arising from the same adjudication decision ('AD') following adjudication proceedings commenced by the respondent pursuant to a payment claim issued under s. 5 of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'). The background facts were that by way of a letter of acceptance, the Malaysian Government accepted a tender submitted by Konsortium Skypark Link Sdn Bhd-Lion Pacific Sdn Bhd ('consortium') for a construction project ('project'). In the letter of award, the consortium appointed the appellant as a sub-contractor for the system works package parcel of the project. The appellant appointed the respondent as a sub-contractor for the works by way of a subcontract on 24 November 2014 ('subcontract'). The respondent claimed that a sum of RM24,902,980.45 was due from the appellant to the respondent regarding the works. The appellant disputed the respondent's claim. Hence, the respondent's claim was referred to adjudication before the adjudicator. The appellant disputed the respondent's claim for reasons, amongst others, that by reason of cls. 3.1 and 4.1, payment for the works shall only become due from the appellant to the

A respondent upon Ministry of Transport's ('MOT') certification of the payment under the main contract and the respondent's claim for variation works could not be allowed in view of cls. 50 and 53. The adjudicator delivered the AD and ruled that: (i) only seven out of the nine invoices which totalled RM12,001,692.71 were allowed; (ii) the respondent's loss arising
B out of extension of time was rejected; (iii) the respondent's claim (variation works) was partly allowed wherein the respondent could only recover a sum of RM521,040 for the respondent's claim; and (iv) the appellant shall pay to the respondent a total sum of RM12,522,732.71. Both parties filed originating summons ('OS') where (i) the appellant filed an OS for the
C following orders: an order that the AD made by an adjudicator in favour of the respondent be set aside; and if the AD was not set aside, an order to stay the enforcement of the AD until the disposal of an arbitration between the appellant and the respondent; and (ii) the respondent filed an OS for leave of court to enforce the AD against the appellant. The judge dismissed the
D appellant's OS and allowed the respondent's OS. Hence, these appeals by the appellant. The main grounds raised by the appellant were (i) the CIPAA does not apply to the subcontract as the main contract which formed part of the subcontract was entered into prior to the coming into force of the CIPAA. As such, the adjudicator had no jurisdiction over the adjudication proceedings between the parties; (ii) the adjudicator had acted in excess of
E his jurisdiction by incorporating a new contractual term into the subcontract; and (iii) there were clear and/or manifest errors in the AD that warranted a stay of the AD.

Held (allowing appeals)

Per Gunalan Muniandy JCA delivering the judgment of the court:

F

(1) A plain reading of the subcontract made it clear that the offer was only made to the respondent on 24 November 2014 and pursuant to 'subsequent negotiations' the works were then awarded to the respondent. Thus, the subcontract came into effect only on 15 April
G 2014 and it was a contract within the meaning of s. 2 of the CIPAA, particularly that it was a construction contract. The appellant's proposition as to the adjudicator's lack of jurisdiction on the basis of the main contract preceding the coming into force of the CIPAA was misconceived and wrong in law. Notwithstanding the nexus between the two back-to-back contracts, they were separate contracts with only one
H common party. The judge had not erred in deciding that the adjudicator had jurisdiction to adjudicate the respondent's claim pursuant to the CIPAA because the respondent's claim was based on the subcontract which was concluded on 24 November 2014 (after the enactment of the CIPAA). All the rights and obligations of the respondent and the
I appellant arose solely from the subcontract (not the main contract). (para 22)

(2) As to whether the adjudicator had completely disregarded the express contractual term requiring certification of the respondent's work by the project director of MOT ('PD'), the issue at hand should be answered in the affirmative. The adjudicator had clearly misconstrued the intention and purpose of s. 35 of the CIPAA. In the result, he had made a flawed decision that cl. 4.1 could not apply despite this clause not being a pay when paid provision. Applying s. 35 of the CIPAA to cl. 4.1 of the subcontract was tantamount to a jurisdictional error or an exercise of powers in excess of jurisdiction. His approach to contractual interpretation was indeed arbitrary and fundamentally wrong that manifested as a clear misapprehension of his powers and functions. (paras 27-29)

(3) The adjudicator's misconstruction of the term 'pay when certified' as being 'pay when paid' which was prohibited as a conditional payment under s. 35 of the CIPAA also amounted to the incorporation of a new contractual term into the subcontract to which the parties had not mutually agreed. The adjudicator did not have the jurisdiction to take it upon himself to incorporate any new contractual term or condition into the contract in question between the parties to the adjudication. The payment dispute must be determined strictly within the confines of the subcontract wherein its terms and conditions did not call for the adjudicator to make a determination on a purported 'pay when paid' clause which was non-existent. (paras 30 & 31)

(4) Contrary to the respondent's allegation, there was no default by the appellant in making payment to the respondent as the appellant was only obliged to make payment to the respondent upon certification or approval by the PD of the MOT evidenced by a certificate signed by him. This was expressly provided in cl. 4.1 of the subcontract to which the High Court ought to have given effect as a mutually agreed term. Whilst CIPAA was intended to alleviate cash flow problems of contractors and in doing so, it prohibited conditional payments, it was clearly not intended to replace the certification or valuation to assess the progress of works carried out by the relevant authority for payment to be affected. (paras 32 & 37)

(5) The judge had plainly fallen into error in not appreciating the adjudicator's failure to consider the fundamental element of the appellant's defence, namely: the non-entitlement of the respondent to its claim without certification by the PD of the MOT; and the certificate issued by the appellant for the sum of RM8.83 million was only at the request of the respondent for the sole purpose of securing financing and not for work done which was the basis of the payment claim for which evaluation and certification by the approving authority was crucial. This

was a fit and proper case for appellate interference to correct the error of the judge that arose primarily from insufficient judicial appreciation of the matters and facts placed before him. (paras 47-49)

Case(s) referred to:

ABB Ltd v. Bam Nuttall Ltd 149 ConLR 172 ***(refd)***

All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Ireka Engineering & Construction Sdn Bhd v. TRI Pacific Engineering Sdn Bhd [2020] 1 LNS 387 HC ***(refd)***

Jack-In Pile (M) Sdn Bhd. v. Bauer (Malaysia) Sdn Bhd & Another Appeal [2020] 1 CLJ 299 FC ***(refd)***

John Holland Pty Ltd v. Chidambara [2017] WASC 179 ***(refd)***

Majlis Perbandaran Seremban v. Tenaga Nasional Bhd [2020] 10 CLJ 715 FC ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC

NKT Cables A/S v. SP Power Systems Ltd 172 ConLR 121 ***(refd)***

Red Ink Homes Pty Ltd v. Court [2014] WASC 52 ***(refd)***

Smith v. Chadwick [1882] 20 Ch D 27 ***(refd)***

UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case [2015] 5 CLJ 527 HC ***(refd)***

UMW Toyota Motor Sdn Bhd & Anor v. Allan Chong Teck Khin & Anor [2021] 5 CLJ 193 CA ***(refd)***

Legislation referred to:

Construction Industry Payment and Adjudication Act 2012, ss. 2, 4, 5, 12(1), 15, 25(n), 35(1), (2)(a), (b)

For the appellant - Sanjay Mohanasundaram, Wong Li-Wei & Dharushini Bai; M/s Sanjay Mohan

For the respondent - Rodney Gomez, Aarthi Jeyarajah & Kevin Richard Nathan; M/s Shearn Delamore & Co

[Editor's note: Appeal from High Court, Shah Alam; Originating Summons No: BA-24C-70-07-2020 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Gunalan Muniandy JCA:

Introduction

[1] There are two appeals before us, arising from the same adjudication decision ("AD") dated 30 October 2019 following adjudication proceedings commenced by the respondent pursuant to a payment claim ("PC") dated 5 April 2019 issued under s. 5 of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"). Both appeals are by the appellant against decisions made by the learned High Court Judge ("LJ") who dismissed the appellant's application to set aside and/or stay the AD and allowed the respondent's application for an enforcement order of the same AD. As both

the applications were heard together by the LJ, our grounds would encompass both the High Court orders from which the present appeals emanate.

Background Facts

[2] By way of a letter of acceptance dated 22 January 2013, the Malaysian Government had accepted a tender submitted by Konsortium Skypark Link Sdn Bhd-Lion Pacific Sdn Bhd ("consortium") for a construction project ("project").

[3] In the letter of award dated 7 October 2013, the consortium appointed the appellant as a sub-contractor for the system works package parcel of the project.

[4] The appellant appointed the respondent as a sub-contractor for the works by way of a sub-contract dated 24 November 2014 ("sub-contract").

[5] The respondent claimed that a sum of RM24,902,980.45 was due from the appellant to the respondent regarding the works. The appellant disputed the respondent's claim. Hence, the respondent's claim was referred to adjudication before the learned adjudicator.

[6] The appellant disputed the respondent's claim for the reasons, amongst others, that by reason of cls. 3.1 and 4.1, payment for the works shall only become due from the appellant to the respondent upon Ministry of Transport's ("MOT") certification of the payment under the main contract and the respondent's claim for variation works could not be allowed in view of cls. 50 and 53.

[7] The learned adjudicator delivered adjudicator decision ("AD") as follows:

(i) the learned adjudicator only allowed seven out of nine invoices which totalled RM12,001,692.71;

(ii) the respondent's loss arising out of extension of time was rejected;

(iii) the respondent's claim (variation works) was partly allowed wherein the respondent could only recover a sum of RM521,040 for the respondent's claim;

(iv) the appellant shall pay to the respondent a total sum of RM12,522,732.71 on or before 15 January 2020;

(v) interest and costs shall be paid by the appellant to the respondent.

[8] Both parties filed originating summonses ("OS"):

(i) OS No. BA-24C-73-07-2020 has been filed by the appellant for the following orders: an order that AD made on 30 October 2019 by an adjudicator in favour of the respondent be set aside; and if the AD is not set aside, an order to stay the enforcement of the AD until the disposal of an arbitration between the appellant and the respondent.

(ii) The respondent filed OS No BA-24C-70-07-2020 for leave of court to enforce the AD against the appellant.

[9] The LJ dismissed the appellant's OS and allowed the respondent's OS. Hence, the appellant appealed to the Court of Appeal against the said decision.

Our Decision

[10] The appellant took a two-prong approach to the appeals before us, namely: that, on the facts and in law, the High Court should have set aside the AD and dismissed the enforcement application; alternatively, the High Court should at the very least have allowed the AD to be stayed until the disposal of the arbitration initiated by the appellant.

[11] For convenience, we would make reference to the main grounds raised by the appellant as summarised below by the respondent:

(i) CIPAA does not apply to the sub-contract as the main contract which forms part of the sub-contract, was entered into prior to the coming into force of CIPAA. As such, the learned adjudicator has no jurisdiction over the adjudication proceedings between the parties ("main ground no. 1").

(ii) The learned adjudicator had acted in excess of his jurisdiction by incorporating a new contractual term into the sub-contract ("main ground no. 2").

(iii) There are clear and/or manifest errors in the adjudication decision that warrants a stay of the adjudication decision ("main ground no. 3").

[12] At the outset, the respondent impressed upon us that CIPAA does not provide a right to appeal against the decision of the learned adjudicator, which in this instance was largely based on findings of fact and appreciation of the evidence adduced and may only be set aside in very limited circumstance as provided under s. 15 of CIPAA.

[13] As regards main ground no. 1, the appellant's contention was that CIPAA had no application to the sub-contract as the main contract which forms part of the sub-contract, was entered into prior to the coming into force of CIPAA. As such, that the LJ had erred in law and/or in fact by failing to appreciate that the learned adjudicator has no jurisdiction over the adjudication proceedings between the parties.

[14] In pressing for the AD to be declared a nullity for want of jurisdiction on the part of the adjudicator to conduct the adjudication proceedings, the appellant relied on the following factors:

(i) The respondent is fully aware that the contract entered into between the Government of Malaysia and the consortium and the contract entered into between the consortium and the appellant were entered prior to CIPAA coming into force.

(ii) The term and condition ("T&C") of the main contract and equally applicable to the sub-contract between the respondent and the appellant pursuant to the T&C of sub-contract.

(iii) Under the sub-contract, the respondent was made a party to the main contract which means that the main contract applies to all disputes between the parties to the sub-contract.

(iv) As the respondent had knowledge that the main contract applied to both the above parties, the respondent is deemed to be a party to the main contract.

[15] The question then that calls for our determination on the threshold jurisdiction point is whether CIPAA has no application to the sub-contract as the main contract which forms an integral part of the contract between the respondent and the appellant were entered into prior to 15 April 2014, *ie*, on 22 January 2013 (the date of the letter of acceptance in the main contract).

[16] It is indisputable that CIPAA would not apply to contracts entered into prior to 15 April 2014 as held by the Federal Court in *Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd & Another Appeal* [2020] 1 CLJ 299. In short, that CIPAA is prospective in nature.

[17] The appellant's proposition was that based on the express terms of the sub-contract, the sub-contract and the main contract are to be construed as one transaction given the back-to-back application of the main contract. In this regard, we refer to *The Interpretation of Contracts* (6th edn) at para. 3.03:

> In such cases, where the transaction is in truth one transaction, all the contracts may be read together for the purpose of determining their legal effect.

[18] Where documents are shown to be contemporaneous, a series of the deeds are entered into between the contracting parties, the deeds in principle represent a single transaction between them and ought to be treated as one deed (*See Smith v. Chadwick* [1882] 20 Ch. D 27).

[19] In essence, the thrust of the appellant's case was that the respondent is deemed to be a party to the main contract pursuant to cl. 3.1 of the sub-contract and both the contracts formed part of the same series of transactions. That being the case, as the main contract came into existence

before CIPAA came into force, any payment dispute under the sub-contract cannot be referred to the adjudicator pursuant to this Act rendering the adjudicator being devoid of jurisdiction to adjudicate the dispute. Therefore, that the LJ had come to an erroneous finding that the adjudicator was seized with jurisdiction to decide the payment claim submitted by the respondent which the appellants disputed.

[20] In support to the LJ's finding on jurisdiction, the respondent contended that the date when the main contract was entered into is irrelevant to the adjudication proceedings and that the date of the sub-contract, which is 24 November 2014 should be the only relevant date for consideration as to whether CIPAA applies as the adjudication proceedings arose out of the sub-contract. The appellant's contention, hence, holds no weight given the fact that the adjudication proceedings were initiated under the sub-contract that was entered into on 24 November 2014, a date well after CIPAA was passed on 15 April 2014.

[21] Our attention was also drawn to recital 2 of the sub-contract a plain reading of which made it clear that the offer was only made to the respondent on 24 November 2014 and pursuant to "subsequent negotiations", the works were then awarded to the respondent. Thus, the sub-contract came into effect only on 15 April 2014 and it was a contract within the meaning of s. 2 of CIPAA, particularly that it was a construction contract made in writing.

[22] For the reasons put forth by the respondent, we were in agreement with its contention that the appellant's proposition as to the adjudicator's lack of jurisdiction on the basis of the main contract preceding the coming into force of CIPAA was misconceived and wrong in law. Notwithstanding the nexus between the two back-to-back contracts, our considered view is that they are separate contracts with only one common party. The LJ had not erred in deciding that the adjudicator had jurisdiction to adjudicate PT's claim pursuant to CIPAA because PT's claim was based on the sub-contract which was concluded on 24 November 2014 (after the enactment of CIPAA). All the rights and obligations of PT and LP arose solely from the sub-contract (not the main contract). In other words, both PT and LP could only enforce the sub-contract (not the main contract). The mere fact that cl. 3.1 had incorporated all the provisions of the main contract into the sub-contract, did not mean that LP and PT had entered into the main contract. PT and LP are the initials used by the LJ for the respondent and appellant respectively.

[23] We will now proceed to consider the second main ground of appeal relating to the adjudicator having purportedly exceeded his jurisdiction by incorporating a new non-existent contractual term into the sub-contract to the detriment of the appellant. He was alleged to have acted in excess of his jurisdiction by considering purportedly irrelevant matters when he unilaterally advocated and decided that the certification mechanism as agreed

between the parties is a mechanism which is prohibited by s. 35 of CIPAA. Amongst others, the appellant also contended that pursuant to the sub-contract, the certification by the Government of Malaysia, *via* the Ministry of Transportation ("MOT") is required prior to any payment to the respondent.

[24] The appellant stressed that both parties had expressly agreed to the provision that the certification by the project director of the MOT is the only document required to confirm whether the respondent had in reality completed its works (cl. 4.1 of sub-contract) and whether the respondent is entitled to be paid. Reproduced below is the relevant extract from cl. 4.1 of the sub-contract:

> Verification and approval by ICC-MOT 15th – 24th every month. Payment to Sub-Contractor 40 days after certification by MOT

[25] It was contended that despite this express provision, the adjudicator wrongly found that the terms of the sub-contract which require the certification of the respondent's work by the project director of MOT ("PD") falls under s. 35 of CIPAA and therefore, it is void.

[26] Section 35 of CIPAA prohibits conditional payment as follows:

> (1) Any conditional payment provision in a construction contract in relation to payment under the construction contract is void.

[27] The question before us was whether the adjudicator, as the appellant urged us to take note of, had completely 'disregarded the aforesaid express contractual term requiring certification by the PD of the MOT'. Importantly too, whether the said certification was purely to determine the works carried out by the plaintiff and should not be regarded as a provision for conditional payment.

[28] We are in agreement with the position taken by the appellant that the above questions on the issue at hand should be answered in the affirmative. The appellant's further contention that found favour with us is that, nevertheless the adjudicator had proceeded to make a determination based on his inaccurate and/or erroneous conclusion or interpretation that s. 35 of CIPAA applies to not just 'pay when paid' provision but also to 'pay when certified' provision.

[29] Our view is that the arbitrator had clearly misconstrued the intention and purpose of s. 35 of the CIPAA. In the result, he had, as submitted by the appellant made a flawed decision that cl. 4.1 cannot apply despite this clause not being a pay when paid provision. Applying s. 35 of the CIPAA to cl. 4.1 of the sub-contract is tantamount to a jurisdictional error or an exercise of powers in excess of jurisdiction. His approach to contractual interpretation was indeed arbitrary and fundamentally wrong that manifested as a clear misapprehension of his powers and functions. (See *Red Ink Homes Pty Ltd v. Court* [2014] WASC 52).

[30] The adjudicator's misconstruction of the term 'pay when certified' as being 'pay when paid' which is prohibited as a conditional payment under s. 35 of CIPAA also amounted to the incorporation of a new contractual term into the sub-contract to which the parties had not mutually agreed. It is plain to us that the adjudicator did not have the jurisdiction to take it upon himself to incorporate any new contractual term or condition into the contract in question between the parties to the adjudication. Refence was rightly made to the decision of the Supreme Court of Western Australia in *John Holland Pty Ltd v. Chidambara* [2017] WASC 179, where the Australian Court quashed the adjudicator's determination on the ground that the adjudicator failed to have proper regard to the terms of the construction contract.

[31] In our view, the payment dispute must be determined strictly within the confines of the sub-contract wherein its terms and conditions did not call for the adjudicator to make a determination on a purported 'pay when paid' clause which we note was non-existent.

[32] We also upheld the submission of the appellant that contrary to the respondent's allegation, there was no default by the appellant in making payment to the respondent as the appellant is only obliged to make payment to the respondent upon certification or approval by the PD of the MOT evidenced by a certificate signed by him. This is expressly provided in cl. 4.1 of the sub-contract to which the High Court ought to have given effect as a mutually agreed term.

[33] In his analysis of the law applicable to the issue at hand, the LJ dealt with two conflicting views expressed by the Malaysian Courts as to whether the effect of s. 35(1) of CIPAA is limited by s. 35(2)(a) and (b) of CIPAA ("first view") as decided in *UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Anorther Case* [2015] 5 CLJ 527; [2015] 11 MLJ 499; or whether the effect of s. 35(1) is not confined by s. 35(2)(a) and (b) as expressed in several High Court decisions, the latest being *Ireka Engineering & Construction Sdn Bhd v. TRI Pacific Engineering Sdn Bhd* [2020] 1 LNS 387; [2020] MLJU 548.

[34] It was the second view that found favour with the LJ for, *inter alia*, these reasons:

(i) there is nothing in s. 35(1) of CIPAA which limits its effect to the two circumstances specified in s. 35(2)(a) and (b) of CIPAA. On the contrary, Parliament has employed a wide term "any" in s. 35(1) of CIPAA. The broad meaning of the word "any" has been explained by the following judgement of the Federal Court delivered by Augustine Paul FCJ in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 113, at [41] and [42].

(ii) If I have accepted the first view, this will render redundant the wide term "any" in s. 35(1) of CIPAA – please refer to the judgment of Augustine Paul FCJ in the Federal Court case of *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195; [2006] 5 AMR 585, at pp. 600 to 601.

(iii) The opening words of s. 35(2) of CIPAA clearly show that the two instances of conditional payment provision in s. 35(2)(a) and (b) of CIPAA cannot limit the wide effect of the term "any" in the preceding sub-section.

(iv) The adoption of the second view is in harmony with an adjudicator's wide power under s. 12(1) read with s. 25(n) of CIPAA to "decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter" (adjudicator's s. 25(n) power). Reference made to the Federal Court case of *Majlis Perbandaran Seremban v. Tenaga Nasional Bhd* [2020] 10 CLJ 715; [2020] 12 MLJ 1, at [32], Zaleha Yusof FCJ has applied the rule of harmonious construction of statutory provisions. Acceptance of the first view that s. 35(1) of CIPAA does not invalidate a contractual provision which stipulates that payment for "construction work" (as defined in s. 4 of CIPAA) is conditional upon certification ("pay-if-certified" provision), a "non-paying party" (as understood in s. 4 of CIPAA) can resist a lawful claim for payment for construction work merely on a "pay-if-certified" provision will not be in harmony with s. 12(1) read with s. 25(n) of CIPAA but instead will render nugatory the adjudicator's s. 25(n) power; and

(v) It is not disputed that the object of CIPAA is to ensure that parties who perform construction work are not deprived of cash flow (the lifeblood of the construction industry).

[35] Lastly, the LJ held that the acceptance of the first view would be contrary to the object of CIPAA by enabling a non-paying party to dispense with payment for work done by inserting a conditional payment provision beyond the reach of s. 35(2)(a) and (b) of CIPAA. Thereafter, the LJ's conclusion on cl. 4.1 of the sub-contract was as follows:

(i) the sub-contract is a commercial contract which should be construed in a commercially sensible manner, please see the Federal Court's judgment delivered by Gopal Sri Ram FCJ in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597, at [10];

(ii) on a commercially sensible construction of cl. 4.1, it is clear that cl. 4.1 is a "pay-if-certified" provision; and

(iii) applying the second view (as explained in the above paras. 19 and 20), cl. 4.1 is invalidated by s. 35(1) of CIPAA. As such, the learned adjudicator did not err in his construction of cl. 4.1

[36] Regardless of whether the first or second view is accepted as alluded to by the LJ, we maintain our opinion that from a plain and literal reading of the wording of s. 35(1) of the CIPAA a "pay-if-certified" provision as per cl. 4.1 of the sub-contract cannot be construed as a conditional payment clause as the mutual agreement of the parties was that the appellant's obligation to make payment would only arise upon certification of the works done by the PD of the MOT failing which the works cannot be considered as having been carried out. That much is pure and simple. Notwithstanding the object of CIPAA being to facilitate prompt payment, the contractual obligations of the parties as expressly agreed upon cannot in principle be disregarded.

[37] For the reasons elucidated above, our conclusion on the issue at hand is that the LJ had erred in holding that cl. 4.1 of the sub-contract is invalidated by s. 35 of CIPAA as it went beyond the express intention of the contracting parties. We concur with the appellant's submission that whilst CIPAA was intended to alleviate cash flow problems of contractors and in doing so, it prohibited conditional payments, it was clearly not intended to replace the certification or valuation to assess the progress of works carried out by the relevant authority for payment to be affected.

[38] Next for our deliberation is the last core issue which concerns the purported denial of natural justice to the appellant by the adjudicator. It was premised on the adjudicator's failure to appreciate that there was an absence of the certification from the PD of the MOT and proceeding to make an award in favour of the respondent, premised on a 'pay when paid' clause. It was contended that the adjudicator had, thus, unilaterally incorporated new terms into the contract between the parties.

[39] The adjudicator was said to have based his decision on a 'pay when paid' clause which was never in existence and never agreed upon by the parties. Importantly, it would appear that the appellant was never asked to address the proceeding on this issue that was material to the adjudicator's final decision.

[40] The appellant impressed upon us that the parties ought to have been afforded a right to be heard on the following key issue:

(i) whether the 'pay when certified' clause in the sub-contract *ie*, cl. 4.1, is equivalent to 'pay when paid' in s. 35 of CIPAA?

(ii) whether s. 35 of CIPAA would affect the contractual right of the parties?

(iii) whether the parties have always acted pursuant to cl. 4.1 of the sub-contract?

[41] A case in point brought to our attention was *ABB Ltd v. Bam Nuttall Ltd* 149 ConLR 172 where it was concluded that:

> [41] I therefore have no doubt that there was a serious breach of the rules of natural justice by the adjudicator who decided a key issue in the adjudication by reference to and in reliance upon a clause 11.1A which neither party had referred to or relied upon and which the adjudicator did not give the parties the opportunity to address him on. It is not for the court to speculate why the adjudicator did what he did …

[42] In essence, the alleged denial of natural justice by the adjudicator was centred on his failure to give recognition and importance to the terms of the sub-contract wherein the mandatory certification by PD of the MOT was a significant feature that had been agreed to for entitlement of payment to the contractor. The importance and relevance of the certificate by the PD had apparently not given weight to and further, that in the absence of the certificates, the sums claimed would not be payable. It was contended that, to our minds was not without basis, that had the adjudicator given proper consideration to the certification (or lack of) by the project director of the Ministry of Transport he would have held that no sums are payable to the respondent.

[43] Also highlighted to us, amongst others, was the fact that the adjudicator had failed to give consideration to the defence raised by the appellant in respect of the certificate issued for the loss and expense claim arising from the extension of time no. 1 amounting to RM8.83 million whereas its defence was that this certificate that was issued by the appellant was as a result of the request made by the respondent to obtain additional financing. This was not a certificate issued by the Project Director of the MOT within the meaning of cl. 4.1 of the sub-contract. This fact as to the purpose of the said certificate by a letter dated 26 October 2021 from the consortium regarding their meeting held on 28 September 2017 with the appellant and the respondent.

[44] Where an adjudicator has failed to take note of the main substantive defences raised before arriving at his decision, the enforcement of an AD is liable to be declined in principle. In the English case of *NKT Cables A/S v. SP Power Systems Ltd* 172 ConLR 121, it was held:

> This ground adds little to the ground of challenge just discussed. The Adjudicator either failed to deal with most of the substantive defences or, if these were considered, the Adjudicator wholly failed to state that he had done so or to explain why he had rejected them. I do not accept that the passages relied on by Mr MacColl do demonstrate that the Adjudicator had addressed himself to these substantive defences.

[45] Likewise, in this instance, we have been shown that the adjudicator in the process of arriving at his AD had demonstrably failed to carefully consider and appreciate the main substantive defences of the appellant that we have adverted to. There was, thus, possibly a valid defence to the respondent's claim which it was incumbent for adjudicator to seriously consider.

[46] We are not inclined to agree with the LJ that based on the AD the adjudicator had considered all the defences raised by the appellant notwithstanding that some of the defences had been accepted by him. Neither that he had not deprived the appellant of its right to adduce evidence and be heard on all the questions that arose during the adjudication.

[47] On the contrary, we concur with the appellant's position that the LJ had plainly fallen into error in not appreciating the adjudicator's failure to consider the fundamental element of the appellant's defence, namely: the non-entitlement of the respondent to its claim without certification by the PD of the MOT; and the certificate issued by the appellant for the sum of RM8.83 million was only at the request of the respondent for the sole purpose of securing financing and not for work done which was the basis of the payment claim for which evaluation and certification by the approving authority was crucial.

[48] We are satisfied that had the adjudicator given due consideration to the core defence and issues raised by the appellant, it would have made a material defence to the decision arrived at by him which was to a large extent was based on incorporating new terms into the contract.

Conclusion

[49] In the circumstances, our conclusion would be that this is a fit and proper case for appellate interference to correct the error of the LJ that arose primarily from insufficient judicial appreciation of the matters and facts placed before him (See *UMW Toyota Motor Sdn Bhd & Anor v. Allan Chong Teck Khin & Anor* [2021] 5 CLJ 193; [2021] 3 MLJ 107).

[50] We, accordingly, made the following order at the end of this appeal:

We find merit in both appeals. It is our considered view that the learned judge had erred in law in dismissing the appellant's application to set aside the adjudicator's decision dated 30 October 2019 and allowing the respondent's application to enforce the adjudicator's decision as the judgment of the High Court. We therefore allow both appeals and set aside the decision of the learned judge and the adjudicator's decision with costs. Costs of RM30,000 for both appeals here and below subject to allocator.